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Trump Marina Associates, LLC d/b/a Trump Marina Casino Resort and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 4–CA–36528

December 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 27, 2009, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Teamsters Local 523 v. NLRB*, ___ F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing unlawfully broad rules prohibiting employees from releasing statements to the news media without prior approval, and authorizing only certain representatives to speak with the media. The Respondent argues that the judge erroneously conflated the rules, but the Respondent acknowledged in its posthearing brief that the rules are part of a bifurcated approach to limit employee statements to the media. Further, the judge found that after Shift Manager Karen Lew asked employee Mario Spina if he had spoken to the media, Lew refer-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Trump Marina Associates, LLC d/b/a Trump Marina Casino Resort, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 31, 2009

Wilma B. Liebman,

Chairman

Peter C. Schaumber,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Emily DeSa, Esq., for the General Counsel.

Brian A. Caufield, Esq., of Roseland, New Jersey, for the Respondent.

Cassie R. Ehrenberg, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on June 3, 2009. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing rules restricting employees from speaking to the media about protected concerted and union activities within the meaning of Section 7 of the Act. The complaint also alleges that Respondent violated Section 8(a)(1) by interrogating an employee concerning his communications with the media about the decision of an NLRB administrative law judge in a case involving Respondent, and advising the employee that the communication violated Respondent's rules against speaking to the media. Respondent filed an answer denying the essential allegations of the complaint. The

enced both rules. The credited testimony was that Lew asked Spina if Spina represented the Respondent, and reminded him that in the future he would need prior approval before speaking to the media, thus invoking both rules to "restrict Section 7 activity." See *Crowne Plaza Hotel*, 352 NLRB 382, 383 (2008), citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004).

Member Schaumber agrees that the Respondent's questioning of Spina constituted an unlawful interrogation, not necessarily because the Respondent attempted to enforce rules the Board is now finding overly broad, but because the Respondent was clearly inquiring into his Sec. 7 activity.

In support of his finding that the rules are unlawfully overbroad, the judge cited *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). However, in that case there were no exceptions to the Board on that finding. Accordingly, *Saginaw Control* has no precedential value and we do not rely on it. However, *Brunswick Corp.*, 282 NLRB 794, 795 (1987), also cited by the judge, has precedential value and supports his finding.

General Counsel and Respondent filed posthearing briefs, which I have read and considered.

Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following

Findings of Fact

Jurisdiction

Respondent, a New Jersey corporation, is engaged in the operation of a hotel and casino in Atlantic City, New Jersey. During a representative 1-year period, Respondent received gross revenues in excess of \$500,000, and purchased and received, at its casino, goods valued in excess of \$5000 directly from points outside the State of New Jersey.

Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

The Alleged Unfair Labor Practices

Background

On July 18, 2008, Administrative Law Judge Earl Shamwell issued his decision in Cases 4–CA–35334, et al., involving the same Respondent and Union that are involved in the instant case. Judge Shamwell found that Respondent violated Section 8(a)(1) and (3) of the Act in several respects; recommended dismissing other complaint allegations; and sustained certain objections to a Board representation election held on May 11, 2007, among Respondent’s casino dealers. Among the unfair labor practices he found were that Respondent’s Shift Manager Karen Lew discriminatorily issued employee Mario Spina, a leading and open union supporter, a suspension and final warning, after summoning Spina into her office on April 27, 2007. Judge Shamwell also found that Respondent’s unlawful conduct warranted setting aside the election.

On February 17, 2009, the Board affirmed most of Judge Shamwell’s findings, including those involving the suspension and warning of employee Mario Spina. The Board also found, contrary to the judge, that Respondent had additionally violated Section 8(a)(1) of the Act when a supervisor made two coercive statements to Spina. In addition, the Board affirmed Judge Shamwell’s order that the election be set aside and a new election take place. As of the time of the hearing in this case, the new election had not been held, because the Respondent filed a petition to review the Board’s Order. That petition was still pending at the time of the hearing.

Respondent’s Handbook Rules on Talking to the Media

It is stipulated that Respondent’s handbook contains the following rules:

EMPLOYEE CONDUCT

Violation of, disregard for, or any departure from a posted or known Company policy or departmental rule, or commission of any prohibited conduct as outlined below will subject employees to disciplinary action up to and including discharge:

.....

36. Releasing statement to the news media without prior authorization.

.....

PUBLIC SPEAKING/MEDIA REQUESTS

It is the policy of Trump Hotels & Casino Resorts that only the following employees, Chief Executive Officer, the respective property’s Chief Operating Officer, General Manager or Public Relations Director/Manager is authorized to speak with the media.

Employee Spina Comments on Judge Shamwell’s Decision

After the issuance of Judge Shamwell’s decision, a union representative called employee Mario Spina and asked for his comment on the decision. Spina, who understood that the comment would be used in a union publication, said that the judge had gotten “it exactly right,” referring to the determination that the Respondent had discriminated against him. Subsequently, on July 29, 2008, the Union issued a press release describing Judge Shamwell’s decision in favorable terms. In that release, Spina was quoted as saying, “The judge got this one exactly right.” He was also quoted as saying, “[T]he company broke all kinds of rules and interfered with our right to vote—and we’re not going to allow them to get away with it.”

As a result of the Union’s press release, an Associated Press article appeared in the Atlantic City Courier Post about Judge Shamwell’s decision. The article used the quotations of Spina that appeared in the Union’s press release. Several of Respondent’s management officials saw the story and expressed concern that Spina might have violated Respondent’s policy, set forth in its rules above, against talking to the media without permission. Spina had not been authorized by Respondent to talk to the media about Judge Shamwell’s decision. Shift Manager Karen Lew, who had issued Spina the earlier discriminatory warning and suspension, took the lead in investigating Spina’s possible violation of Respondent’s media policy. She first consulted Respondent’s vice president and the director of employee relations and obtained approval to talk to Spina about the possible infraction.

Respondent Confronts Spina About His Comments

On August 12, 2008, Respondent summoned Spina from his work station to Shift Manager Karen Lew’s office. The office is one of several in an area off the casino floor. It is used by different shift managers and is also the site of some training meetings, although it is a relatively small office, about 12 feet by 12 feet. Between the time Spina was summoned to the office and the time he reported, Casino Administrator Mark Walter arrived in the office to talk to Lew about some scheduling matters. He remained in the office after Spina arrived and throughout the short meeting between Lew and Spina, although he did not say anything. Lew sat at one of the two desks in the Shift Manager’s office and Spina sat across from her about 5 feet away.

Lew mentioned the Courier Post article to Spina and referred to his quoted statement in the article. She also mentioned Respondent’s policy against talking to the media. She asked Spina if he had talked to the media and Spina responded that he had talked only to a union representative. Lew also asked if

Spina was a representative of the Trump dealers or of Trump and he said that he had made no such statement. Lew then reminded Spina that in the future he would have to receive prior approval before speaking to the media.

The above is based on the composite testimony of Spina, Lew and Walter, all of whom testified about the meeting. Except in one respect, to the extent that their testimony conflicts, I rely primarily on the testimony of Spina, whom I viewed as a candid and reliable witness.¹ There are two significant conflicts in the testimony of the three witnesses to the meeting. Walter and Lew testified that Lew asked whether Spina was aware of Respondent's policy against talking to the media without authorization and Spina responded that he was not aware of it. Spina did not testify that the specific question was asked or that he responded he was not aware of the policy. His testimony is that Lew asked whether he talked to the media and affirmatively stated that he had violated the policy. In addition, Spina testified that Lew asked him if he was a representative of the Trump dealers or Trump and he said that he had made no such statement. Lew denied asking Spina whether he was a representative of the Trump dealers. Walter did not testify about that matter; thus, he did not corroborate Lew.

As indicated above, I found Spina the most credible witness of the three who testified about the meeting. Neither Walter nor Lew impressed me as reliable witnesses. Walter's testimony was very conclusory and he could not even recall whether Lew mentioned the newspaper article to Spina. Lew's testimony was likewise conclusory, not corroborated by Walter in one respect, and implausible in other respects. For example, on cross-examination, she testified that Spina volunteered, without prompting or responding to a question by her, that he did not make the statement to the press, but made it to a union representative. It seems obvious to me that Spina's statement was in response to a question from Lew. In addition, Lew testified that she did not ascertain from Spina whether he permitted himself to be quoted. Again, that seems to me implausible, in view of her stated purpose in calling Spina into her office. Moreover, I perceived in Lew's demeanor a reluctance to testify in detail about her remarks to Spina. She seemed more interested in summarily testifying that she simply wanted to make Spina aware of the Respondent's policy and nothing more, thus exculpating herself from the allegations in this case.

Discussion and Analysis

Respondent does not dispute that Spina's comments to his union representative, which were then repeated in a press release by the Union and carried in at least one newspaper, amounted to protected concerted activity within the meaning of Section 7 of the Act. See generally, *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The question then is whether the maintenance and enforcement of Respondent's rules were unlawful and

whether Respondent's interrogation of Spina about his possible violation of the rules was coercive.²

The Unlawful Maintenance and Enforcement of Respondent's Rules

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board faced an issue similar to that presented in this case: whether a rule prohibiting employees from talking to the press was unlawfully broad and thus violative of the Act. Citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), the Board affirmed that Section 7 of the Act protects "employee communications to the public that are part of and related to an ongoing labor dispute." *Id.* at 386 fn. 21. In *Crowne Plaza*, the Board found that the rule in that case could reasonably be construed as "prohibiting all employee communications with the media regarding a labor dispute;" at the very least, the rule could be viewed as "ambiguous." The Board concluded that the rule was facially overbroad and thus the maintenance of the rule was violative of Section 8(a)(1) of the Act. *Id.* at 386. See also, with respect to interfering with the protected right to talk to the media about labor disputes, *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000); and *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

Applying *Crowne Plaza* to the facts of this case, I find that Respondent's rules likewise interfere with the Section 7 right of employees to communicate with the public concerning an ongoing labor dispute. Indeed, this is a stronger case than *Crowne Plaza* because the communication involved an earlier Board case between Respondent and the Union and the communication was made by an employee who was found by an administrative law judge to have been discriminated against in that case. The employee's comment that the judge's decision was "exactly right" is surely the type of comment that the Act protects. Moreover, the meeting at which Shift Supervisor Lew made clear that Respondent's rules applied to his comments shows in dramatic fashion that Respondent not only maintained its unlawfully broad rules against talking to the media, but that it was enforcing them—indeed enforcing them specifically to encumber communication related to an ongoing labor dispute. Accordingly, I find that Respondent violated the Act by maintaining and enforcing unlawfully broad rules prohibiting employee communication with the media.³

² Although it appears that only one of Respondent's rules specifically prohibits employees from talking to the media without permission, it is clear that another ancillary rule limits the individuals who are authorized to speak with the media. Thus, although sometimes only one rule is referenced in the testimony, it is clear that both rules operate to limit protected concerted or union activity and both were mentioned in the complaint. As discussed more fully below, Respondent acknowledges that the two rules are to be read together as a single policy, which Respondent characterizes as bifurcated.

³ The fact that the prohibition was conditioned on not first obtaining Respondent's permission does not save the rules. To the extent that an employee is required to obtain permission before engaging in protected activity, that requirement is an impediment to the full exercise of an employee's Sec. 7 rights. See *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 553 (2003); and *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

¹ I do not accept Spina's testimony that Lew did not reference Respondent's written policy in their meeting. He testified that Lew simply stated that he had violated Respondent's policy. I find it more plausible that she did at least reference Respondent's written rules, contained in the handbook, in accordance with her testimony and that of Walter.

As noted, Respondent describes its media policy as bifurcated (Br. 15–16). According to Respondent, the rule set forth in its handbook under the heading, public speaking/media requests, contains no prohibition, but merely defines who is authorized to speak to the media on behalf of Respondent. Similarly, Respondent contends that rule 36, set forth in the handbook under the heading, employee conduct, contains no substantive prohibition, but merely establishes an authorization procedure for media statements by employees not speaking on behalf of Respondent. Respondent’s characterization is at odds with the facts. As set forth above, Respondent’s public speaking/media requests rule states that only certain specified officers and managers are “authorized to speak with the media.” The employee conduct section of Respondent’s rules makes violations or disregard of any posted or known policy or rule ground for “disciplinary action up to and including discharge” and rule 36 of that section specifically prohibits “[r]eleasing statement[s] to the news media without prior authorization.”

Contrary to Respondent’s contentions (Br. 13, 15), the very nature of the Lew-Spina meeting shows that the rules did not simply amount to an authorization policy; the rules were applied to and enforced against Spina. Although he was not disciplined, Spina was reminded of the rules against unauthorized talking to the media and the clear implication was that he should not violate those rules again or he would be disciplined. Indeed, as noted, the handbook clearly states that violation of any known or posted rule or policy “will subject employees to disciplinary action up to and including discharge.” Nothing in Lew’s remarks to Spina contradicted the handbook’s disciplinary statement, or limited application of the rules to conduct other than protected concerted or union activity. In these circumstances, Respondent’s attempt to distinguish *Crowne Plaza* (Br. 15) is unavailing.

Respondent’s contention that its rules are justified by business considerations is also without merit. The breadth of the rules far exceeds the reasons offered to justify them. Barbara Hulsizer, Respondent’s director of employee relations and diversity, testified that the reason for the rules is “[t]o prevent any statements that have anything to do with proprietary information or confidential information.” Tr. 91. Examples, she explained, were “[a]ny sort of financial data that has not come to the point of being released, customer lists, marketing plans, new table game products, new slot products. . . .” Tr. 91–92. Those reasons have nothing to do with the Section 7 activities Spina was engaged in. Nor do those reasons provide a legitimate business reason to infringe on Section 7 activities generally. Thus, here, as in *Crowne Plaza*, the “scope of the rule” is “not commensurate with” the limited intent suggested by Respondent’s reasons for the rule. 352 NLRB at 386.

The Unlawful Interrogation

Lew’s remarks at the meeting with Spina also constituted unlawful interrogation. As indicated above, the meeting amounted to an interview that probed into Spina’s protected union and concerted activity. Lew admittedly asked if Spina was aware of the no-talking-to-the-media policy, and, as found in my credibility determination above, she went further and asked another question—whether he represented Respondent or

the dealers. In the circumstances, the questions were coercive. Those circumstances included an effort to enforce an unlawfully broad rule in an office setting that brought into play a previous disciplinary action against Spina by the very supervisor who was previously found to have issued an unlawful warning and suspension against him in that very office. The tendency to coerce in those circumstances far outweighs the fact that Spina was a known supporter of the Union. This is not a situation where an employer asks a known union supporter whether or why he supports a union. It was because Spina was a known and active union supporter that Respondent raised its media rules with him. Lew was concerned that Spina’s protected statements, reported in the media, were a violation of Respondent’s rules; she sought to confirm the possible violation; and to warn against such conduct in the future. Intent, of course, is not a necessary element in an unlawful interrogation; rather, the test is the reasonable tendency of the questioning to restrain protected concerted activity. But, where, as here, an employer seeks to confirm particular protected activity and to restrain it in the future, the obvious tendency of the questioning is to have the restraining effect sought. Accordingly, I find that Respondent also violated the Act by interrogating Spina about his possible violation of its rules in an effort to inhibit continuation of his protected concerted activity. See *Brighton Retail, Inc.*, 354 NLRB No. 62, slip op. 1 fn. 4 (2009); and *M.V.M., Inc.*, 352 NLRB 1165, 1175 (2008).

Conclusions of Law

1. Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing rules that prohibit an employee from releasing statements to the media without prior permission or limit employees authorized to speak with the media and by interrogating an employee about the application of those rules.

2. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall order that it cease and desist from the conduct found to be unlawful and to rescind its unlawful rules, remove them from its handbook, and advise employees in writing that its unlawful rules are no longer being maintained and enforced. Nothing shall prevent Respondent from reissuing similar rules to achieve legitimate business purposes that do not infringe on the Section 7 rights of employees. See *Crowne Plaza Hotel*, 352 NLRB 382, 388 fn. 33 (2008).

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended⁴

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining or enforcing rules in its employee handbook that prohibit employees from releasing statements to the news media without prior authorization and limiting the employees who are authorized to speak with the media.

(b) Interrogating employees about violating rules that infringe on their protected Section 7 activities under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the employee handbook's rules with respect to employees releasing statements to the news media without prior authorization and limiting those who are authorized to speak with the media.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2008.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2009

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce rules in our employee handbook that prohibit employees from releasing statements to the media without prior authorization and limit their authority to speak with the media.

WE WILL NOT interrogate employees about their Section 7 rights.

WE WILL NOT in any like or related manner interfere with, restrain, coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL rescind the rules set forth above from the employee handbook.

WE WILL furnish all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

TRUMP MARINA ASSOCIATES, LLC TRUMP MARINA
CASINO RESORT